

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

DOCKET FILE COPY ORIGINAL

RECEIVED

JUN 1 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In The Matter of

Annual Assessment of the Status of  
Competition in the Market for the  
Delivery of Video Programming

)  
)  
)  
)  
)

CS Docket No. 95-61

To: The Commission

COMMENTS  
OF  
THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

By: John B. Richards  
John Reardon

Keller and Heckman  
1001 G Street, N.W.  
Suite 500 West  
Washington, D.C. 20001  
(202) 434-4210

Dated: June 30, 1995

Its Attorneys

No. of Copies rec'd 509  
List ABCDE

## TABLE OF CONTENTS

<b>I.</b>	<b>BACKGROUND .....</b>	<b>2</b>
<b>II.</b>	<b>COMMENTS .....</b>	<b>3</b>
<b>A.</b>	<b>The Commission's rules should prohibit exclusive arrangements between vertically-integrated programmers and non-cable operator distributors in areas unserved by cable. ....</b>	<b>8</b>
<b>B.</b>	<b>The Commission's rules should specifically allow for an award of damages --at <u>least</u> in the amount of over payments -- for a Program Access violation. ....</b>	<b>10</b>
<b>III.</b>	<b>CONCLUSION .....</b>	<b>12</b>

## SUMMARY

NRTC submits that the vertically-integrated cable programming industry continues to stifle competition in the market for delivery of video programming by Multichannel Video Programming Distributors ("MVPDs"). Many of the basic Program Access problems identified by Congress in the Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act") remain uncorrected.

As the direct result of exclusivity arrangements by vertically-integrated programmers for areas unserved by cable, NRTC is unable to obtain access to critical programming for distribution via DBS. Instead of multiple MVPDs competing vigorously to provide a diversity of service offerings to DBS consumers, as envisioned by Congress, these types of exclusivity arrangements place the future of DBS solely in the hands of a few large, vertically-integrated cable programmers. Ultimately, DBS consumers will pay the price in inconvenience and higher retail rates, and DBS will suffer as an alternative distribution technology and a competitive force to cable.

Nor has NRTC been able to obtain the programming of certain satellite carriers and large, vertically-integrated C-Band programming distributors at fair and non-discriminatory prices. As a C-Band distributor, NRTC is routinely required to pay significantly more than comparably sized cable operators are required to pay for

the same programming. The Commission's Program Access rules -- although recognizing the Commission's statutory authority to award damages -- fail to include specific provisions awarding damages or even mandating the return of overpayments for a Program Access violation.

To combat these problems, the Commission should banish certain types of exclusivity arrangements and should make it clear that significant damages will be awarded by the Commission for price discrimination and other Program Access violations.

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

In the Matter of )  
 )  
Annual Assessment of the Status of ) CS Docket No. 95-61  
Competition in the Market for the )  
Delivery of Video Programming )

To: The Commission

COMMENTS  
OF  
THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

Pursuant to Section 1.430 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission"), the National Rural Telecommunications Cooperative ("NRTC"), by its attorneys, hereby submits these Comments concerning the strength and viability of competition in the market for delivery of video programming.<sup>1/</sup> NRTC submits that there will not be full competition in the market for delivery of video programming until the Commission prohibits exclusive arrangements between vertically-integrated programmers and non cable operator distributors in areas unserved by cable. Further, the rules must provide for the recovery of damages -- at least in the amount of demonstrated overpayments -- by those distributors clearly and demonstrably injured due to violations of the Program Access rules.

---

<sup>1/</sup> Notice of Inquiry ("Notice"), 60 Fed. Reg. 29533 (released May 24, 1995).

## **I. BACKGROUND**

1. NRTC is a non-profit cooperative association comprised of 521 rural electric cooperatives and 231 rural telephone systems located throughout 49 states. NRTC's mission is to assist member companies and affiliates in meeting the telecommunications needs of more than 60 million American consumers living in rural areas. Through the use of satellite distribution technology, NRTC is committed to extending the benefits of information, education and entertainment programming to rural America -- on an affordable basis and in an easy and convenient manner -- just like those services are available on cable in more populated areas of the country. NRTC seeks to ensure that rural Americans receive the same benefits of the information age as their urban counterparts.

2. Using C-Band technology, NRTC and its Members currently market and distribute packages of satellite-delivered programming, called "Rural TV®," to Home Satellite Dish ("HSD") subscribers throughout the country. C-Band distribution technology requires the use of relatively large (6-8') receiving antennas.

3. NRTC also provides high-powered Direct Broadcast Satellite ("DBS") services to rural subscribers across the country. Under an Agreement with Hughes Communications Galaxy, Inc. ("HCG"), NRTC, its Members and affiliated companies

currently market and distribute up to 150 channels of popular cable and broadcast programming ("Direct TV®") to rural households equipped with 18-inch DBS satellite receiving antennas.

4. Accordingly, NRTC is engaged in the business of making available for purchase, by subscribers and customers, multiple channels of video programming. As a result, NRTC is a Multichannel Video Programming Distributor ("MVPD") pursuant to 47 C.F.R. § 76.1000(e).

## **II. COMMENTS**

5. After its first full year of marketing and selling DirectTV®, NRTC cannot yet provide complete quantitative data to respond to many of the specific questions raised by the Commission in its Notice. Nonetheless, at this point, NRTC can provide a general picture of the status of competition in the market for the delivery of video programming. NRTC believes the Commission will find this general account to be illustrative of certain remaining regulatory problems, as well as the unique achievements of the satellite programming distribution industry. For convenience, the Commission's questions are repeated below.

**Question 40(a): To what extent does the subscribership of these DBS services overlap? . . . .**

6. NRTC believes it is inevitable that some overlap exists between DBS services. NRTC generally suspects, however, that due to the compatible nature of services and the not-insignificant start-up price for residential DBS, a residential subscriber of one service, DirectTV®, for example, in most cases would not subscribe to a second service, such as PrimeStar, and vice versa. No specific, quantifiable data, however, is available to NRTC.

**Question 40(c): Where are most DBS subscribers located (i.e., urban versus rural areas)? . . . .**

7. Satellite technology is uniquely suited to provide telecommunications services to rural America due to the fact that the cost of satellite service -- unlike wire services -- is unrelated to subscriber location. With satellites, the cost of providing access to the most distant, rural subscriber is the same as for an urban dweller. In all likelihood, many of the more remote areas of the country will never be "passed" by cable, nor served by fiber optic systems. Many of these areas, in fact, are deemed "white areas" under the copyright law and are not served even by over-the-air, terrestrial broadcast systems.<sup>2/</sup> For many rural Americans, satellite technology

---

<sup>2/</sup> 17 U.S.C. § 119.



provides sole access to information, entertainment, and educational programming.

Most of NRTC's subscribers, as a result, are located in rural areas.

**Question 40(e): How does each operator market its services? . . . .**

8. NRTC, its members and affiliates utilize many different methods of local advertising and marketing, including advertisements in magazines and newspapers, on local television stations, and offering DBS via telephone solicitation and door-to-door sales. In addition, NRTC relies upon word-of-mouth among family and friends to entice and educate new consumers about the advantages of DBS.

**Question 40(f): Has the inability to offer local broadcast channels affected the competitive impact of DBS service? . . .**

9. NRTC submits that the problem is not the physical inability of DBS systems to offer local broadcast channels, but the confusion created when consumers cannot purchase network satellite channels they wish to receive. Under the Copyright Act, "unserved households" is defined to include, among other things, only those households that have not, within 90 days of subscribing to receive the satellite signals, subscribed to a cable system that provides the signal of a primary network station affiliated with that network, and cannot receive a Grade B signal. 17 U.S.C. §119(d)(10). These impediments, in our view, unnecessarily block the distribution of network signals via satellite to those subscribers who wish to purchase them.

**Question 40(g): Are the prices for DBS services nationally uniform, or do they vary depending on the location of the subscriber? . . . .**

10. In general, DBS prices are relatively similar nationwide. Often, however, local service providers have significant freedom to price certain DBS programming in a flexible manner based upon local circumstances. Like any industry, competition and price sensitivity determines to a great extent what can be charged and, like any other service provider, NRTC itself is sensitive to -- and responsive to -- the pricing pressures of the marketplace.

**Question 42: In addition to the issues addressed in the questions set forth above, the Commission observes that local zoning and other regulations may potentially serve as an impediment to the development and expansion of DBS service. In that regard, we note that the Commission recently adopted a Notice of Proposed Rule Making concerning the issue. We seek comment on these issues.**

11. NRTC plans to file its Comments separately in the recently-adopted Notice of Proposed Rule Making in IB Docket No. 95-59 concerning local zoning restrictions.

**Question 45(b): Has the inability to offer local broadcast channels affected the competitive impact of HSD services? . . . .**

12. In the C-Band market, price discrimination by vertically-integrated programming vendors -- not the inability to offer local channels -- poses the primary

Program Access problem. As we noted in our Comments in response to the Commission's 1994 Competition Report, large, vertically-integrated satellite broadcast and cable programming vendors require NRTC to pay significantly more than cable rates for C-band distribution rights.<sup>3/</sup> As discussed below, those concerns are continuing.

**Question 45(d): Sales of new HSD systems and new subscriptions to HSD package programming services grew at substantially slower rates in the last few months of 1994. To what can that decline be attributed? . . . .**

13. Much of the success experienced by the C-Band industry in 1994 was due to conversion of customers who previously obtained their service on an unauthorized basis. Many of these individuals purchased C-Band subscriptions for the first time; this conversion constituted a one-time boost in C-Band sales. The subsequent "decline" the Commission refers to in Question 45(d) is, we believe, actually a leveling-off of demand from the anomalous increase in demand created by the conversion in 1994 of unauthorized viewers into paying customers.

**Question 90(a): The 1992 Cable Act attempted to address difficulties that non-cable MVPDs faced in acquiring programming services on nondiscriminatory terms. We request comment on whether the program access rules and our decisions in response to program access complaints have served their intended purpose to alleviate this problem. . . .**

---

<sup>3/</sup> See, NRTC's Comments, CS Docket No. 94-48, at ¶ 13.

14. NRTC reiterates its position that the major cable companies continue to thwart the competitive potential of HSD and DBS by ignoring Program Access requirements. NRTC participated extensively in the Commission's proceeding implementing the Program Access provisions of the 1992 Cable Act.<sup>4/</sup> Following adoption of the First Report and Order in that proceeding,<sup>5/</sup> NRTC commended the Commission for its landmark decision to prohibit discrimination in the provision of video programming. NRTC pointed out in its Petition for Reconsideration ("Petition"), however, that the Commission's Program Access rules contained two glaring loopholes. Cf., 47 U.S.C. 628(c)(2)(C); 47 C.F.R. 76.102(c)(1).<sup>6/</sup>

**A. The Commission's rules should prohibit exclusive arrangements between vertically-integrated programmers and non-cable operator distributors in areas unserved by cable.**

15. First, the Commission's rules fail to implement fully the Congressional ban against exclusive arrangements by vertically integrated programmers in areas unserved by cable. The Program Access provisions of the 1992 Cable Act were

---

<sup>4/</sup> Notice of Proposed Rulemaking, MM Docket No. 92-265, 58 Fed. Reg. 328 (January 5, 1993); Comments and Reply Comments of NRTC, January 25 and February 16, 1993, respectively.

<sup>5/</sup> Program Access Decision, 58 Fed. Reg. 27658 (May 11, 1993).

<sup>6/</sup> See, Petition for Reconsideration of NRTC, MM Docket No. 92-265, June 10, 1993; denied, Memorandum Opinion and Order on Reconsideration of the First Report and Order (December 15, 1994); see also, Reply of NRTC, MM Docket No. 92-265, July 28, 1993.

designed by Congress to create a level playing field for all MVPDs. The 1992 Cable Act directed the Commission to establish rules to prohibit exclusive arrangements which prevent MVPDs from obtaining programming from vertically-integrated programmers for distribution to persons in areas not served by cable.

47 U.S.C. 548(c)(2)(C). The Commission's implementing rule, however, failed to prohibit exclusive arrangements between vertically-integrated cable programmers and non-cable operator distributors.<sup>7/</sup>

16. This deficiency was addressed at length in NRTC's unsuccessful Petition. As NRTC pointed out, vertical integration remains a serious impediment to competition to cable via DBS.<sup>8/</sup> As a DBS distributor, NRTC has no access to any of the popular programming of certain very large, vertically-integrated cable programmers. These cable programmers utilize exclusive, anti-competitive DBS distribution arrangements with a non-vertically-integrated, non-cable operator DBS distributor to block access by NRTC and DirectTV® to their programming. This type

---

<sup>7/</sup> 47 C.F.R. 76.1002(c)(1).

<sup>8/</sup> See United States v. Primestar Partners, 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994), for instance, where vertically-integrated programming vendors tried unsuccessfully to block distribution of programming to potential competitors of Primestar. The Department of Justice and attorneys general of 40 states commenced federal antitrust actions against Primestar for anticompetitive restrictions on cable programming access, and a consent decree was entered into restricting the use of exclusive agreements. Id.

of exclusivity is contrary to the spirit and specific language of the Program Access provisions of the Cable Act (47 U.S.C. 548(c)(2)(C)) and should be prohibited by the Commission's rules (47 C.F.R. 76.1002(c)(1)).

Currently, these exclusive arrangements prevent NRTC from selecting from a competitive menu of programming for distribution over DBS to persons in areas unserved by cable. In the meantime, the cable industry has complete access to this programming for distribution via cable, HSD, and DBS. Competition from DBS to cable is reduced, consumer choice is lessened, and DBS prices are unnecessarily inflated.

**B. The Commission's rules should specifically allow for an award of damages --at least in the amount of overcharges -- for a Program Access violation.**

17. The second major loophole in the Program Access rules is that they do not specifically allow for an award of damages for a Program Access violation. The fact that only a handful of Price Discrimination Complaints have been filed at the Commission in the past year does not necessarily mean that the Program Access rules are working. Without the possibility of an award of damages to an aggrieved MVPD following successful prosecution of a complaint at the Commission, there is little incentive for an MVPD to pursue a remedy at the Commission.

18. As NRTC pointed out in its Petition, the Commission has ample authority under the 1992 Cable Act to order "appropriate remedies" for Program Access violations. 47 U.S.C. § 628(e)(1). Although, on reconsideration, the Commission agreed with NRTC and determined that it did in fact possess the requisite statutory authority, it declined to adopt specific rules to that effect at that time.<sup>9/</sup>

19. NRTC submits that the ability of MVPDs to compete effectively depends upon their ability to offer video programming that appeals to consumers. As the Commission recognized in developing the Program Access rules, nondiscriminatory access to programming is "essential to the entry and survival of competing distribution technologies."<sup>10/</sup> At a minimum, therefore, aggrieved MVPDs must be able to receive restitution of overcharges paid to violators of the Commission's Program Access rules.

20. Once an MVPD has incurred the expense and inconvenience of successfully prosecuting a Program Access Complaint at the FCC, the absolute least the Commission should do is to order the Defendant to remit the overpayments. To do otherwise is to permit the programmer or satellite carrier to benefit financially

---

<sup>9/</sup> Memorandum Opinion and Order on Reconsideration of the First Report and Order, MM Docket No. 92-265, at ¶ 17.

<sup>10/</sup> Notice of Proposed Rule Making, MM Docket No. 92-265, 58 Fed. Reg. 328 (January 5, 1993) at ¶ 65.

from violation of the Program Access statute and rules. Without damages, violators of the Program Access rules have no incentive not to continue flaunting the Commission's requirements and choking off potential competition in the process.

### **III. CONCLUSION**

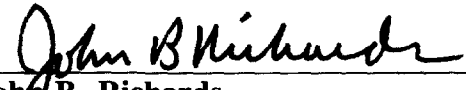
The vertically-integrated cable industry continues to stifle competition from alternative distribution technologies by denying access to DBS programming and by discriminating in price against C-band satellite distributors. The Commission should prohibit the use of exclusive DBS arrangements between vertically-integrated programmers and non-cable operator distributors in areas unserved by cable, and should develop rules whereby the Commission will award damages (at least in the amount of demonstrated overcharges) for violations of the Program Access requirements. Without the ability to recover their damages, aggrieved MVPDs understandably will continue to be reluctant to bring actions against abusive programmers and satellite carriers, who will continue to flout the letter and spirit of the Program Access requirements. Without these modifications to the Commission's rules, competition in the market for the delivery of video programming will remain undeveloped.



**WHEREFORE, THE PREMISES CONSIDERED**, the National Rural Telecommunications Cooperative urges the Commission to consider these Comments as part of its Annual Report to Congress as the Status of Competition in the Market for the Delivery of Video Programming, and to revise its rules in accordance with the views expressed herein.

**Respectfully submitted,**

**NATIONAL RURAL  
TELECOMMUNICATIONS COOPERATIVE**

By:   
John B. Richards  
John Reardon

**Keller and Heckman  
1001 G Street, N.W.  
Suite 500 West  
Washington, D.C. 20001  
(202) 434-4210**

**Its Attorneys**

**Dated: June 30, 1995**